SIOW WONG YEN

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, JOHOR BAHRU
MOHD. YUSOF ABDUL RASHID J
[CRIMINAL APPEAL NO. 4 OF 1981]
10 MAY 1982

TRADE AND INDUSTRY: *Weights and Measures - Instruments for weighing not conforming to enactment - Whether in possession for use of trade.*

CRIMINAL PROCEDURE: *Appeal - Accused convicted and fined RM24 and weighing instruments ordered to be forfeited - Whether appeal lies against fine not exceeding RM25 - Whether forfeiture an additional penalty.*

This was an appeal against the decision of the learned Magistrate who found the appellant guilty, convicted and fined him RM24 of an offence under s. 9 of the Weights and Measures Enactment of Johore. He was found to have in his possession for use for trade two weighing instruments which were not in conformity with the standards established under the Enactment.

At the start of the appeal, the learned DPP raised a preliminary objection that the appellant had no right of appeal since no appeal lies under s. 304 of the Criminal Procedure Code for any offence if the punishment is a fine not exceeding RM25. As for the appeal proper the appellant contended that he was wrongly convicted since he did not have in his possession the 2 instruments for weighing for use for trade and the two weighing instruments were in conformity with the standards established under the Enactment.

Held:

[1] A person convicted under s. 9 of the Enactment is not punishable with fine only not exceeding twenty five ringgit but may incur additional penalty of the instrument for weighing found in his possession or used by him being forfeited.

[2] Since the trial Magistrate had ordered the forfeiture of the instruments for weighing, on the accused being convicted under the said s. 9, the accused is not precluded under s. 304 of the Criminal Procedure Code from appealing against the conviction and sentence.

[3] It is manifestly clear that the two instruments for weighing which were forfeited were used by the accused for the purposes of carrying on his trade and that the accused's factory was situated in Johore.

[4] Since the two instruments for weighing forfeited could only record weights in metric, they were not in conformity with the requirements of the Enactment.

[5] In the circumstances, the learned Magistrate had not erred in law or in fact in convicting the accused.

[Appeal dismissed. Conviction, sentence and order of forfeiture confirmed.]

Cases referred to:
Teow Cheow Tong & 12 Ors. v. Rex 10 SSLR 41

Legislation referred to:
Criminal Procedure Code, s. 304
Weights and Measures Enactment (Johore), ss. 2, 3(i), 4, 5, 9

For the appellant - Upali Masacorale
For the respondent - Mohd. Apandi Ali, DPP

JUDGMENT

Mohd. Yusof bin Abdul Rashid J:

The appellant was charged under s. 9 of the Weights and Measures Enactment of Johore ("the Enactment") as he was found to have in his possession for use for trade two instruments for weighing which were not in conformity with the standards established under the Enactment. The appellant was found guilty and convicted. He was fined RM24 and the two instruments for weighing were ordered to be forfeited to the Government. Dissatisfied with the said finding and conviction, the appellant appeals to the High Court.

The facts may be stated briefly thus:

On 16 November 1977 about 12.05 p.m., the inspector of weights and measures, accompanied by his driver, visited the SMR Foh Chong Factory at Kempas, Johor Bahru. He met the accused. It was the intention of the said inspector to inspect the weighing machines used in the factory to ascertain whether or not they comply with the provisions of the Enactment. When one Avery platform scale machine serial no. S. 706032 with 8 proportional weights, found in the factory, was inspected, it was discovered that the 8 proportional weights were expressed in metric. They were not verified nor stamped by the inspector of weights and measures, Johore. The Avery platform scale machine was not seized immediately as it was too heavy. The inspector went to the police station to lodge a report since he found that the use of the weighing machine was in contravention of the Enactment. Later about 4.30 p.m., accompanied by two police officers, the inspector returned to the factory and seized the said weighing machine.

During the second visit, the inspector found that another weighing machine was being used for weighing. It was a Zhunseng platform scale with 5 proportional weights expressed in metric which had not been verified nor stamped under the Enactment.

The Inspector and the police officers loaded the Avery platform scale machine onto a van and took it away. The Inspector seized and sealed the Zhunseng platform scale machine but since was too heavy to be removed he left it at the factory. It was only on 29 November 1977 that the Zhunseng platform scale machine was removed.

Before the appeal proper was argued, the learned Deputy Public Prosecutor attached to the Ministry of Trade and Industry raised a preliminary objection. It was alleged that the appellant had no right of appeal since no appeal lies under s. 304 of the Criminal Procedure Code for an offence the punishment of which is fine only not exceeding twenty five ringgit. The provisions of the said s. 304 are as follows:

> No appeal shall lie from a judgment, sentence or order of a Magistrate in the case of any offence punishable with fine only not exceeding twenty-five ringgit.

and s. 9 of the Enactment provides:

> Any person who uses or has in his possession for use, for trade any weight, measure or instrument for weighing which is not in conformity with the standards hereby established or which is false or unjust, shall be liable to a fine not exceeding twenty-five ringgit; or, in the

> case of a second offence, fifty ringgit; and any contract, bargain, sale or dealing made by the same shall be void, and the weight, measure and instrument for weighing shall be liable to be forfeited.

The learned Deputy Public Prosecutor cited the cited of *Teow Cheow Tong & 12 Ors. v. Rex* 10 SSLR 41 for the proposition "that the forfeiture was not an additional penalty for the offence of playing so as to give the appellants a right of appeal against the offence for playing as an offence punishable with a fine of more than RM25." On a careful reading of the said case, the following opinion was expressed by Law, J:

> ... The real state of the case is that there are two matters dealt with by the Magistrate. One, a conviction for the offence of playing in a common gaming house punishable under s. 7, and the other an order of forfeiture. The latter is a separate and distinct matter from the offence of playing. Under s. 11, any money found, if the Magistrate is of the opinion that it was intended to be used for gaming, may be forfeited. That is not a penalty on any particular person. It is not even necessary for the order for forfeiture that the offence of playing should be established. If a person went to a common gaming house with the intention of gaming, the money found on him might be forfeited. It cannot, therefore, be a penalty for playing in a common gaming house, and the mere fact that a forfeiture was ordered cannot give the appellants the right against the conviction for playing ...

I have no doubt at all that Law, J had expounded correctly the law applicable in the case before him. However, whilst the learned Judge had correctly stated the law relating to forfeiture under the common gaming house, the said statement of law may not necessarily apply generally in all cases. The question which requires to be considered is whether or not forfeiture is an additional penalty for the offence committed by the offender.

Under the Criminal Procedure Code the word "fine" is defined under s. 2 to mean "includes any fine, pecuniary penalty or forfeiture or compensation adjudged upon any conviction of any crime or offence or for the breach of any law for the time being in force by any Court in the Federation;". It is thus clear that if the forfeiture is adjudged upon any conviction of any offence, such order of forfeiture is a penalty for committing such offence. The "forfeiture" considered by Law, J was not dependent upon conviction of the offender for gambling in a common gaming house; such "forfeiture" may be ordered even if the owner of the goods forfeited had not been convicted.

In the instant case, the forfeiture of the two instruments for weighing, each valued at RM5,000, was made under s. 9 of the Enactment and in my view, such order of forfeiture may only be made on the conviction of a person for an offence under the said s. 9. Without the said offender being convicted, no order of forfeiture could possibly be made. In consequence, I am of the opinion that a person convicted under s. 9 of the Enactment is not punishable with fine only not exceeding twentyfive ringgit but may incur additional penalty of the instrument for weighing found in his possession or used by him being forfeited. Hence, since the trial Magistrate has ordered the forfeiture of the two instruments for weighing, on the accused being convicted under the said s. 9, the accused is not precluded under s. 304 of the Criminal Procedure Code from appealing against the conviction and sentence.

Adverting to the appeal proper, the accused contended that he was wrongly convicted under s. 9 of the Enactment since he did not have in his possession for use for trade (within the meaning of the Enactment) the two instruments for weighing and that since the said instruments for weighing were in conformity with the standards established under the Enactment.

The word "trade" is defined under s. 5 of the Enactment as follows:

> (i) Every contract, bargain, sale of dealing made or had in the state for any work, goods, wares or merchandise or other thing which has been or is to be done, sold, delivered or agreed for by weight or measure shall be deemed to be made or had according to one of such standard weights or measures, or to some multiple or aliquot part thereof; and if not so made or had, shall be void ...
>
> (ii) Such contract, bargain, sale, dealing and collection of tolls and duties as in this section mentioned is in this Enactment referred to under the term 'trade'.

In the instant case, there is no dispute that the accused was empowered to carry on the business of import and export of rubber in Johore but the accused contended that his dealings involved only the export of rubber. In evidence the accused testified:

> The SMR factory processes and treats raw rubber. The finished produce is exported overseas. I also pack up the rubber. I do not sell any of the rubber locally.

The accused further testified:

> The 2 weighing machines taken from my factory (i.e. P3 and P4) were used in the following manner: the Avery machine is for standardising the approximate weight of exported rubber. The second machine, Zhunseng, is used by us to counter-check some packing material that is sold to us by the suppliers. The packing materials are polythene bags and polythene sheets. We have to standardise the weight of rubber because under the SMR rubber each pallet of SMR rubber has to be 1 metric ton - the net weight is 1 metric ton ...

From the said evidence, it is manifestly clear that the two instruments for weighing which were forfeited were used by the accused for the purposes of carrying on his trade. There is no doubt at all that the accused's factory was situated in Johore. Despite the fact, the counsel for the accused contended that the accused was not carrying on any trade in the State of Johore on the ground that the accused's business was principally to export rubber overseas. In my opinion, for the purpose of s. 5 of the Enactment, the accused carried out " ... dealing ... had in the State for any ... goods ... which ... is to be ... delivered ... by weight ... " and such dealing was "trade" under the said section.

The next issue to be determined is whether the two instruments for weighing were in conformity with the standards established under the Enactment. Section. 3(i) of the Enactment, so far as material, provides:

> (i) The same weights and measures shall be used throughout the State, an the only unit or standard measure of extension from which all other measures of extensions, whether lineal, superficial or solid, shall be ascertained shall be the imperial standard yard; **and the only unit or standard measure or weight from which all other weights and all measures having reference to weight shall be ascertained shall be the imperial standard pound**; ...

It was contended by the counsel for the accused that by virtue of s. 4, the standard weights and measures of the State were at the material time the imperial standard pound as well as the metric weights for, the weights and measures in use in the United Kingdom at that material time were the metric weights. Section 4 of the Enactment provides:

> (i) The Minister shall cause to be deposited and safely kept in the office of the Custodian copies of the weights an measures in use in the United Kingdom and of such of the weights mentioned in the Second Schedule hereto as he shall from time to time think fit; and the weights and measures so deposited shall be the standard weights and measures of the State ...

and the provisions of the Second Schedule are as follows:

1 Tahil =1 1/3oz.
16 Tahils = 1 Kati=1 lbs.
1600 Tahils = 100 Katis = 1 Pikul = 133 lbs.
64,000 Tahils = 4,000 Katis = 40 Pikuls = 1 Koyan = 5,333 lbs.

It is clear that under s. 4 the standard weights and measures shall be the standard weights and measures in use in the United Kingdom and the weights as set out under the second schedule. However due to the clear provisions of s. 3(i) of the Enactment, i.e. "the only unit or standard measure or weight from which all other weights and all measures having reference to weight shall be ascertained shall be the imperial standard pound.." and the weights set out in the Second Schedule, I cannot accept the contention that the standard weights in force in the State, at the material time, were otherwise than the imperial standard pound, tahil, kati, pikul and koyan. Thus, in the instant case, since the two instruments for weighing forfeited could only record weights in metric, they were not in conformity with the requirements of the Enactment.

In the circumstances, I found that the learned Magistrate had not erred in law or in fact in convicting the accused. In the result, the appeal is dismissed, and the conviction, sentence and order of forfeiture are confirmed.

Also found at [1982] CLJ 496